STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 19, 2000
v	No. 219499 Oakland Circuit Court
JESSIE B. JOHNSON, Defendant-Appellee.	LC No. 92-115814-FH

Before: Wilder, P.J., Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Defendant was charged with two counts of possession with intent to deliver more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant pleaded guilty to the above offenses on May 1, 1995, and the trial court agreed to allow defendant, pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), to withdraw his guilty pleas if the court imposed sentences higher than five to thirty years' imprisonment for each offense. On June 23, 1995, defendant was sentenced to five to thirty years' imprisonment for each offense.

The prosecutor sought leave to appeal with this Court, and this Court denied leave. *People v Johnson*, unpublished order of the Court of Appeals, entered December 27, 1995 (Docket No. 190415). The prosecutor then filed an application for leave to appeal to the Michigan Supreme Court, which remanded the case to this Court in lieu of granting leave. *People v Johnson*, 451 Mich 873; 549 NW2d 564 (1996). This Court reversed the sentences imposed by the trial court and remanded the case for resentencing. *People v Johnson (On Remand)*, 223 Mich App 170; 566 NW2d 28 (1997). On remand, defendant withdrew his guilty pleas and moved to dismiss the charges based on entrapment. On April 19, 1999, the trial court found that defendant was entrapped, granted defendant's motion to dismiss and entered an order of dismissal. The prosecution now appeals as of right.

The prosecutor argues that the trial court clearly erred in finding that defendant was entrapped into committing the charged offenses. We disagree. We review a trial court's findings regarding entrapment for clear error. *People v Connolly*, 232 Mich App 425, 428-429; 591 NW2d 340 (1998). Clear error exists if this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

Michigan State Police Lieutenant Gregory Sykes testified that he met defendant while working in an undercover capacity in January 1992. Sykes told defendant that he was a fairly large narcotics distributor with operations in Detroit and Mount Clemens. He said that he wanted to set up drug houses in Pontiac and that he wanted to hire defendant to protect against arrest and theft and to provide information regarding potential drug raids. Sykes told defendant that the defendant could make around $50,000.

Sykes contacted defendant at least five times over a two-month period. All the phone conversations between defendant and Sykes were recorded. Sykes saw defendant possess drugs at the mock drug sales that were arranged by Sykes and had never seen defendant possess drugs at any other time. Defendant never offered to sell drugs to Sykes or offered to obtain drugs from another source. Defendant also never offered to set Sykes up with someone who wanted to buy drugs.

On February 7, 1992, Sykes contacted defendant and told him that he needed defendant to pick up a package. Defendant followed Sykes in his car to a shopping center at Square Lake Road and Telegraph. In the parking lot, Sykes approached another undercover officer who was sitting inside a car. Defendant stood on the passenger side of the officer's car. Sykes exchanged money for drugs with the officer and called defendant over to the driver's side of the car. Sykes handed defendant the package of cocaine. Sykes testified that the purpose of calling defendant over was so that defendant could provide protection and ensure that nothing happened to the shipment. Sykes claimed that defendant could not have served either of these functions while standing on the other side of the car. After the transaction, Sykes informed defendant that he was expected to take the drugs, check them, ensure that the package was right, and notify Sykes if there was a problem.

After the mock drug buy, Sykes paid defendant $1,000. Sykes testified that he did not consider this amount to be excessive considering that the street value of the drugs was about $74,000. Sykes also paid defendant $1,000 following a second mock drug buy that occurred in a similar fashion on March 4, 1992.

Entrapment exists if either: (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the court. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Many factors are analyzed to determine whether the police activity would induce criminal conduct. See *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991) (Brickley, J); *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992). The mere furnishing of an opportunity to commit an offense, however, is not entrapment. *Ealy*, *supra* at 510.

Defendant has met his burden of proving entrapment by a preponderance of the evidence. *Juillet*, *supra* at 61. Although no appeals were made to defendant's sympathy as Lemuel Flack's friend, no lengthy time lapse existed between the investigation and arrest, no offers of sexual favors were made, and defendant was aware that his conduct was illegal, many of the remaining factors were present in this case. The evidence showed that defendant had not previously committed the offenses charged. Flack informed Captain McFalda that defendant merely owned

a house and accepted money for allowing Flack to sell drugs out of the house. No evidence was presented that defendant ever possessed, supplied, or sold drugs prior to his involvement in this case. In fact, Lieutenant Sykes testified that he had never seen defendant possess drugs at any time other than at the staged drug buys and that defendant never offered to sell drugs to Sykes or to set Sykes up with someone who wanted to buy drugs. As such, he was not known to commit the crimes charged before Sykes' involvement with this case. Courts have found that when a drug user is convicted for the sale of drugs where no evidence existed that police had knowledge that he was a drug dealer, he was entrapped. *Juillet, supra* at 67. In this case, not only did the police have no knowledge that defendant was a drug dealer, they also had no knowledge that defendant was a drug user.

Furthermore, the procedures employed by the police escalated defendant's conduct from merely owning a drug house to possession with intent to deliver cocaine. Sykes initially "hired" defendant to protect against arrest and theft and to inform Sykes of any potential drug raids. At the first staged drug buy, however, Sykes called defendant over and handed defendant the package of cocaine. It was only after the first transaction that defendant was informed that he was expected to handle the drugs, check them, and ensure that the package was "right." This active involvement was not contemplated prior to the buy. Sykes' actions, therefore, served to escalate defendant's passive involvement in the enterprise to active participation beyond the scope of what defendant had agreed to beforehand and pressured defendant into complying with Sykes' requests in order to remain a part of the enterprise.

Undoubtedly, defendant wanted to continue his relationship with Sykes because Sykes told defendant that he could make around $50,000. This extremely high amount of money would serve to make defendant's involvement in the enterprise unusually attractive, especially considering that defendant had agreed to merely provide security for Sykes and to be a passive, rather than an active, participant in the operation. The promise of $50,000 also served as an excessive enticement for defendant to become involved with the operation. Furthermore, there is no question that the investigation was targeted to defendant.

Because many of the factors indicative of entrapment existed in this case, we hold that defendant has met his burden of proving that the police conduct would have induced an otherwise law-abiding person in similar circumstances as defendant to commit the offenses charged.

Entrapment also exists if the police conduct was so reprehensible that, as a matter of public policy, it cannot be tolerated regardless of its relationship to the crime. *Ealy, supra* at 510; *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992). Sykes' conduct in this case was so reprehensible as to constitute entrapment. As previously stated, Sykes "hired" defendant to protect him against arrest and theft and to inform him of any potential drug raids. However, after Sykes and the other undercover officer had already exchanged money and drugs at the first staged drug buy, defendant was informed that he was expected to handle the packages of cocaine and to assume an active role in the enterprise. Sykes waited until the scene of the staged drug buy to inform defendant that he was expected to handle the drugs and gave defendant no choice but to accept the package that was placed in defendant's hands after Sykes summoned him to the driver's side of the car. If Sykes had informed defendant prior to the first sale that his

active involvement was required, defendant would have had the opportunity to decline. Sykes' actions in escalating defendant's conduct without defendant's prior knowledge were reprehensible and beyond the scope of what defendant had previously agreed to perform. This is especially true considering the extremely large amount of money at stake. The excessive amount of money involved, coupled with Sykes' reprehensible conduct in escalating defendant's passive activity into active drug trafficking, was sufficient to establish entrapment.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald